UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No: 12-20030

D-2 ROY DIXON, Hon: Nancy G. Edmunds

Defendant.
________________________________/

SENTENCING MEMORANDUM AND
MOTION FOR DEPARTURE AND VARIANCES

Defendant, Roy Dixon (hereinafter "Dixon"), by his attorney, Edward C. Wishnow, files this Sentencing Memorandum setting forth the factors that this Court should consider in determining the type and length of sentence that is sufficient, but not greater than necessary, to comply with the statutory directives set forth in 18 USC 3553(a).

It is now well accepted that the federal sentencing guidelines are merely advisory and not mandatory, *United States v. Booker*, 125 S Ct 738, 756 (2005); *Rita v. United States,* 127 S Ct 2456 (2007)*; United States v. Gall*, 128 S Ct 586 (2007) and *United States v. Kimbrough;* 128 S Ct 558 (2007).

The Supreme Court in *Nelson v. United States*, 129 S Ct 890 (2009), reiterated the holding in *Rita* that "[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guideline Sentence should apply." *At 892*, *Rita, supra at 2456.*

The court, in Nelson, also reiterated *Gall* in stating that "district judges in considering how the various statutory sentencing factors apply to an individual defendant, 'may not presume that the guidelines range is reasonable.'" *At 892, Gall, supra at 596.*

Dixon adopts herein and incorporates his letter dated June 22, 2015, addressed to Thaddeus K. Dean, Jr. of the United States Probation Department relative to Dixon's observations and objections to the Presentence Investigation Report (PSR) authored by Mr. Dean. To properly address the issues at sentencing, a good part of said letter will be referenced in this Sentencing Memorandum to put things in context.

SENTENCING GUIDELINE ISSUES

It is clear that a sentencing court may not summarily adopt actual findings in the PSR but is required to make specific factual findings on the record to support a loss figure. *United States v. Ross,* 502 F3d 521 (6th Cir. 2007).

Where sentencing factors are in dispute, the sentencing court cannot rely on the PSR to determine such facts. *United States v. Darwich*, 337, F3d 645 (6th Cir 2003).

The Presentence Investigation Report (PSR) suggests that Dixon should be accountable for a specific offense characteristic pursuant to USSG 2C1.1(b)(2) for a fraud loss total of $23,894,000. This sum is arrived at by a loss to the City of Detroit General Retirement System (GRS) in the amount of $10,000,000, a loss to the City of Detroit Police and Fire Retirement System (PFRS) in the amount of $10,000,000 and a loss to the City of Pontiac General Retirement System in the amount of $3,894,000. This results in a 22 level increase in Dixon's guideline level.

The fraud-loss table has been amended effective November 1, 2015. This has been referred to as the inflationary amendment to the fraud-loss table. *See attached* Fraud-Loss Table as Exhibit 1. A level 22 previously was an offense characteristic for loss amounts between 20,000,000 and 50,000,000. Under the amendment, an offense characteristic of a loss between 9,500,000 and 25,000,000 results in an increase in the offense level by 20 and not 22.

Dixon submits that this Court should use the amended guideline fraud-loss table as a variance to correct the fraud-loss amount and resulting guideline range as computed in the PSR.

According to the PSR, Dixon's offense level is 37, with a criminal history category of I, with a resulting guideline imprisonment range of 210 to 262 months. With the amended fraud-loss table, the total offense level would be 35, with a resulting guideline imprisonment range of 168 to 210 months.

Dixon takes issue with this amount for several reasons. First, Dixon pled guilty pursuant to a Rule 11 Plea Agreement which had specific findings of fact as to monies paid by Dixon to Jeffrey Beasley and Paul Stewart. Specifically, there was a trip that Dixon paid for Beasley and his family in August of 2007 to the Turks and Caicos Islands for a vacation. There was another trip that Dixon paid for Paul Stewart and his girlfriend's vacation in Naples, Florida. There was also gift baskets that Dixon gave to Beasley and Stewart and an additional payment to Beasley. Lastly, Dixon made a $10,000 contribution to the Kilpatrick Civic Fund at Beasley's request.

As a result of these bribes, the worksheet that is part of Dixon's Rule 11 Plea Agreement provided a 6 level increase pursuant to 2C1.1(b)(2) for bribes valued between $30,000 and $70,000.

Another reason that the probation department's assessment of the fraud loss figure that should be attributable to Dixon is in error is monies that Dixon obtained from both the City of Detroit and the City of Pontiac were for legitimate investment opportunities.

It should be noted that both cities required an extensive due diligence investigation of the investment opportunities that Dixon presented to the Board.

Northpointe Advisors, a firm that had no relationship with Dixon and which he did not choose, conducted a due diligence of the investment opportunities for the City of Detroit.

Gray & Company did a similar due diligence for the City of Pontiac. That company also had no relationship to Dixon and was not chosen by him.

Furthermore, an independent value and decision consulting company, called Acuitas, did an extensive 37 page report with respect to Dixon's investment in Second Chance Motors, which was the primary investment vehicle that Dixon's company, Onyx Capital Advisors, was investing in. *See attached* Acuitas Report as Exhibit 2.

It should also be noted that the Turks and Caicos investment received a positive due diligence report and that investment was only later rejected because of damage sustained in the islands by a hurricane and the change in the government in the Turks and Caicos resulted in a government that was less favorable for this type of investment.

Furthermore, Dixon's company, Onyx Capital Advisors, paid for all of the due diligence reports referenced above. Dixon himself paid $15,000 for a Turks and Caicos due diligence report, which resulted in a net loss of that amount to him.

Prior to Dixon's involvement with the entanglements of the Kilpatrick administration, he was a highly regarded and established businessman. He started out selling insurance, then became a financial advisor and also a real estate investor. At one point, he had 80 rental properties under his umbrella of assets.

He had also been a broker of record with the Detroit Pension Boards for over 10 years preceding the Onyx Capital Advisory investments. Of particular note is his involvement as the broker of record of a very successful investment vehicle called Inland R.E.I.T that had a high rate of return for both the PFRS and GRS retirement systems for the City of Detroit. Attached hereto as Exhibits 3 and 4 are the Pension Board Schedule of Investments for the calendar years 2002 through 2013 (PFRS) and 2002 through 2009 (for the GRS), respectively.

When Dixon, through Onyx Capital Advisors, was making investments on behalf of the pension boards, the worst economic downturn since the great depression of the 1930s began. The Court can take judicial notice of the financial world in 2007 and 2008. Dixon cannot be held accountable for losses due to market forces or bad decision making by companies that obtained funds. *United States v. Rothwell,* 387 F3d 579, 84 (6th Cir. 2004); *United States v. Zolp*, 479 F3d 715, 719 (9th Cir. 2007).

Furthermore, losses due to market conditions or movements cannot have a defendant responsible for those losses, but must be a result of the defendant's fraudulent conduct. *United States v. Otis*, 429 F3d 540 (5th Cir. 2005). The sentencing court must take a "realistic economic approach to determine what losses the defendant truly caused or intended to cause." *United States v. West Coast Aluminum Heat Treating Co.,* 265 F3d 986, 991 (9th Cir. 200).

Another significant intervening fact occurred that diminished the value of Onyx Capital Advisors' investments. On April 22, 2010, a civil complaint was filed in the United States District Court for the Eastern District of Michigan, in case number 10-cv-11633, by the United States Securities and Exchange Commission against Onyx Capital Advisors and Dixon.

The attendant publicity resulting from this SEC filing caused a loss of interest in Onyx Capital Advisory investments. More specifically, customers and potential customers of portfolio companies of the Onyx Fund lost interest and the banks funding the Onyx Fund pulled their lines of credit.

It should also be noted that the Onyx Capital Advisory Fund, besides their investment in Second Chance Motors, invested in other small companies, as it was supposed to, including Galaxy Holdings and Hi-Tec and Associates, which were viable and valuable companies, but which ended up having internal problems that devalued the value of the investments along with the market conditions and SEC filings as previously discussed.

COMMENT ON THE BRIBES

While it is certainly true that Dixon did and, in fact, admitted to giving bribes as a means to influence both Beasley and Stewart, those bribes should be looked at in the context of the environment of the Kilpatrick administration. That environment has later been described as "Pay to Play."

Dixon admits to making a payment of $20,000 to the Kilpatrick Civic Fund at the behest of Beasley. This was done in part to influence Beasley, but also in large part because of the purported altruistic advertised purposes of the Civic Fund, which were in part to benefit the youth of Detroit. *See attached* Exhibit 5 (Form Letter Eliciting Contributions to the Civic Fund admitted in Trial as Defendants Exhibit 24 and an explanation of the purposes of the Civic Fund).

Dixon had a particular affinity to this purported purpose of the Civic Fund as he was raised in Detroit and benefitted significantly from his time spent at the Detroit Parks and Recreation Centers, including the Lipke and Lasky Recreation Centers on the east side of Detroit. Indeed, he honed his basketball skills there which resulted in a basketball scholarship to Northwestern University where he became captain of the basketball team.

It should also be pointed out that almost all individuals and businesses who did business with the City of Detroit, including corporations, law firms, accounting and advertising firms and all types of entities both in the City of Detroit and nationwide, made significant contributions to the Civic Fund as they were under the impression that the purposes of the Civic Fund were legitimate.

Dixon also admits to paying for a trip for Paul Stewart and his girlfriend to Naples, Florida to attend a New Year's Eve party at Dixon's home. While this was in part to maintain his goodwill with Stewart, it was also a thoughtful gesture on the part of Dixon as both Stewart and his girlfriend had lost their fathers within the previous two months. Indeed, Stewart's father passed away within the week before the trip.

The birthday parties and the picking up of tabs at restaurants was also a common practice by all who dealt with the pension funds.

NEED TO AVOID UNWARRANTED DISPARITIES IN SENTENCING

It is clear that "a district judge, however, may exercise his or her discretion and determine a defendant's sentence in light of a co-defendant's sentence." *United States v. Simmons*, 501 F3d 620, 624 (6th Cir. 2007); *United States v. Wallace,* 597 F3d 794,803 (6th Cir. 2010).

In *United States v. Presley*, 547 F3d 625, 630 (6th Cir. 2008), the Court of Appeals noted that the district court considered the "need to avoid an unwarranted disparity" between the defendant's sentence and a co-defendant's sentence as "the most important consideration."

The proper context of this Court's consideration of an appropriate sentence for Dixon is to look at dispositions of others who are characterized by the government as "bribe payers."

Name	Benefit Received	Purpose	Sentence
Robert Shumake	$1,181,440	1% increase in acquisition fee for ICG Leaseback investment under scenario 8	No prosecution
Jim Papas	$600,000	Fee for BlackEagle investment	No prosecution
Mark Andre Cunningham	$300,000	Fees for Syncom investment	1 day custody

Name	Benefit Received	Purpose	Sentence
Michael Wayne	$1,500,000	Fees for Syncom investment	No prosecution
Christopher Jackson	$360,000	Fees for Real Times and Life Assurance investments	No prosecution

In addition, Derrick Miller, Steven Pankake, a third party marketeer, received and split the $1,181,440 bribe that Robert Shumake made on the ICG Leaseback deal. Derrick Miller pled guilty and received a one day sentence.

In addition, Victor Mercado, a defendant in the Kwame Kilpatrick case and who was in trial for almost a month, ultimately pled guilty and received a sentence of one-day custody.

Mark Andre Cunningham, Derrick Miller and Victor Mercado were all public officials. Miller and Cunningham were fraternity brothers of Kilpatrick and were given positions in the administration by Kilpatrick. Mercado was the head of the Water Department for the City of Detroit.

The statute prohibiting honest services fraud, bribes and kickbacks are primarily directed at public officials, although those who make bribes or receive kickbacks are punished as well. Dixon was at no time a public official.

It is submitted that the dispositions to these individuals involved with the pension boards can provide some guidance to the Court in fashioning a sentence that is sufficient, but not greater than necessary, to comply with the statutory directives of 18 USC 3553(a).

Respectfully submitted,

/s/ Edward C. Wishnow
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Dated: September 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF System which will send notification of such filing to the following: David Gardey and Stephanie Dawkins Davis, Assistant United States Attorneys.

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